No. 82-1922 (8266)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
AND
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
AND
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR PETITIONERS

BRYCE REA, JR.
PATRICK MCELIGOT
REA, CROSS & AUCHINCLOSS
One Thomas Circle, N.W.
Washington, DC 20005
(202) 785-3700
Attorneys for Petitioner, North Carolina Motor Carriers Association, Inc.

WILLIAM PAUL RODGERS, JR.
General Counsel
CHARLES D. GRAY
Assistant General Counsel
1102 ICC Building
Post Office Box 684
Washington, DC 20044
(202) 628-7324
Attorneys for Petitioner, National Association of Regulatory Utility Commissioners

ALLEN I. HIRSCH*
SIMON A. MILLER
ROBERT L. ROTHMAN
ARNALL, GOLDEN & GREGORY
55 Park Place
Atlanta, GA 30335
(404) 577-5100
Attorneys for Petitioner, Southern Motor Carriers Rate Conference, Inc.

*Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

11 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 82-1922

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
AND
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
AND
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Petitioners, Southern Motor Carriers Rate Conference, Inc., North Carolina Motor Carriers Association, Inc., and the National Association of Regulatory Utility Commissioners move for leave to file the attached Supplemental Brief pursuant to Supreme Court Rule 35.6. Petitioners file this Motion and Supplemental Brief to call to the Court's attention a significant decision of the United States Court of Appeals for the Second Circuit, which has a direct

bearing on the issues presented here. The decision, No. 84-7176, *Capital Telephone Company, Inc., et al.* v. *New York Telephone Company,* was decided December 18, 1984, shortly after oral argument was heard in this case on November 26, 1984. This Court should be aware of the Second Circuit's decision in considering this case.

Wherefore, petitioners move that the attached Supplemental Brief be accepted for filing by this Court.

Respectfully submitted,

ALLEN I. HIRSCH*
SIMON A. MILLER
ROBERT L. ROTHMAN
ARNALL, GOLDEN & GREGORY
55 Park Place
Atlanta, GA 30335
(404) 577-5100

Attorneys for Petitioner,
Southern Motor Carriers
Rate Conference, Inc.

BRYCE REA, JR.
PATRICK MCELIGOT
REA, CROSS & AUCHINCLOSS
One Thomas Circle, N.W.
Washington, DC 20005
(202) 785-3700

Attorneys for Petitioner,
North Carolina Motor
Carriers Association, Inc.

**Counsel of Record*

WILLIAM PAUL RODGERS, JR.
General Counsel
CHARLES D. GRAY
Assistant General Counsel
1102 ICC Building
Post Office Box 684
Washington, DC 20044
(202) 628-7324

Attorneys for Petitioner,
National Association of
Regulatory Utility Commissioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 82-1922

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
AND
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
AND
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners, Southern Motor Carriers Rate Conference, Inc., North Carolina Motor Carriers Association, Inc., and the National Association of Regulatory Utility Commissioners file this Supplemental Brief to call to the Court's attention the recent decision of the United States Court of Appeals for the Second Circuit in No. 84-7176, *Capital Telephone Com-*

pany, Inc., et al. v. *New York Telephone Company,* decided December 18, 1984. In that case, a number of providers of radio-telephone and paging services in New York alleged that New York Telephone Company discriminated against them by performing anti-competitive acts, in violation of Sections 1 and 2 of the Sherman Act, and Section 2 of the Clayton Act. New York Telephone Company is regulated by the Public Service Commission of the State of New York. The Court held that New York Telephone Company's actions were immune from antitrust liability under the state action doctrine. It based its decision on this Court's decision in *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.,* 445 U.S. 97 (1980).

In reaching its decision, the Second Circuit considered and expressly rejected the holding of the Court below that in addition to the two part *Midcal* test, there is a third "compulsion" test for private parties under the state action doctrine. (Slip Op. v, n. 3). After noting that the compulsion language first used in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975) "has created substantial confusion in succeeding years", the Second Circuit reviewed this Court's major state action decisions since *Goldfarb*. It concluded that "the present controlling standard for determining whether a state agency's involvement in a regulatory scheme was sufficient to render the acts of private parties immune from antitrust liability [is] [t]he *Midcal* test [which] incorporated and expanded on ideas expressed in earlier decisions" (Slip Op. 7-8).

As does the Fourth Circuit, the Second Circuit also reads this Court's latest state action decision, *Hoover* v. *Ronwin,* —— U.S. ——, 104 S.Ct. 1989, 80 L.Ed.2d

590 (1984) as confirming that there is no "compulsion" test for private parties.[1] It stated:

> In the Supreme Court's latest consideration of state action immunity, the Court's language indicates that no compulsion requirement should be read into the standard. *Hoover* v. *Ronwin,* 52 U.S.L.W. 4535, 4538 (U.S. May 14, 1984).
>
> > Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state *authorization.* . . . In such cases, it becomes important to ensure that the anticompetitive conduct of the State's representative was *contemplated* by the State. . . . If the replacing of entirely free competition with some form of regulation or restraint was not *authorized or approved* by the State then the rationale of *Parker* is inapposite.
>
> *Id.* at 4538 (footnote omitted; emphasis added). This language suggests that the Court does not intend that compulsion be required. The Sixth and Ninth Circuits apparently agree. *See Hybud Equipment Corp.* v. *City of Akron,* 742 F.2d 949 (6th Cir. 1984) (applying two part *Midcal* test; no compulsion requirement included); *United*

---

[1] As North Carolina Motor Carriers Association pointed out in its reply brief, in *N.C. Ex Rel. Edmisten* v. *P.I.A. Asheville,* 740 F.2d 274 (1984) the Fourth Circuit held:

> Since the Supreme Court's decisions in *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 362, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), and *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the right of a private entity to claim *Parker* immunity is clear. Under *Hoover* v. *Ronwin,* —— U.S. ——, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984), a private party has that right even when the state does not compel, but only "authorizes" or "approves" the activity. . . . 740 F.2d at 276-277.

States v. *Title Ins. Rating Bureau of Ariz., Inc.*, 700 F.2d 1247, 1252-53 (9th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3891 (U.S. June 11, 1984) (Same) (Slip Op., v-vi, n. 3).

The Second Circuit concluded:

> Because there is substantial state regulation of the activities in question here, . . . the question should be whether Congress has *preempted* the field of telecommunications regulations. It is clear that Congress has not exclusively occupied this area; the extensive regulatory schemes in virtually every state demonstrate the viability of state interest in the field. In addition, there is no basis for a finding that there is an intolerable conflict between federal and state interests. Therefore, there is no preemption present here. In the absence of evidence of intent to preempt, a holding that a state may not circumvent the antitrust laws through its own regulatory scheme would challenge the federalism on which our governmental system is based (Slip Op. 21, emphasis in original).

Here, too, there are "extensive regulatory schemes in virtually every state", and there is an "absence of evidence of intent to preempt." Additionally, here Congress expressly reserved to the states the power "to regulate intrastate transportation by a motor carrier" (49 U.S.C. § 10521(b), and the states are exercising that power in the same manner as the federal government exercises its power over interstate motor carriers. Hence, Congress could not have intended that the states' "exclusive" power be limited by the strictures of the federal antitrust laws. In other words, it is untenable to infer, as the Court below did, that Congress intended to preempt state law modeled on

federal law and designed to carry out in intrastate commerce the same policy that federal law is designed to carry out in interstate commerce. To do so would not merely "challenge the federalism on which our governmental system is based"—it would stand it on its head!

While there was a dissent in the *New York Telephone* case, it was based on the view that the *Midcal* standards had not been met there.[2] The dissent did not disagree with the majority's rejection of a compulsion requirement for private parties. Hence, on the issue involved here, the majority opinion must be treated as if it were unanimous.

The decision of the Fifth Circuit, Unit B, stands alone and in direct conflict with the decisions of this Court and the decisions of the other Courts of Appeals. It should be reversed.

---

[2] The dissent stated:

> The state statute upon which the majority relies in finding the alleged anticompetitive conduct protected requires only that telephone companies shall provide "adequate service" at "just and reasonable charges" without "unjust discrimination" or "unreasonable preference" and that the Public Service Commission ("PSC") shall have powers of "general supervision" over such companies. N.Y. Pub. Serv. Law §§ 91, 94 (McKinney 1955). This vague mandate cannot satisfy the requirement of *Midcal* that anticompetitive conduct, to be exempt, must be *"clearly articulated and affirmatively expressed* as state policy." *Midcal*, 445 U.S. at 105. (Pierce, Circuit Judge, dissenting, p. 1, emphasis in original).

Contrast the situation here. North Carolina's statute, for example, establishes collective ratemaking as the norm "to realize and effectuate" the following clearly articulated policy: "For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the same or similar services by carriers of the same class." NCGS § 62-152.1(b).

Respectfully submitted,

ALLEN I. HIRSCH*
SIMON A. MILLER
ROBERT L. ROTHMAN
ARNALL, GOLDEN & GREGORY
55 Park Place
Atlanta, GA 30335
(404) 577-5100
Attorneys for Petitioner, Southern Motor Carriers Rate Conference, Inc.

BRYCE REA, JR.
PATRICK MCELIGOT
REA, CROSS & AUCHINCLOSS
One Thomas Circle, N.W.
Washington, DC 20005
(202) 785-3700
Attorneys for Petitioner, North Carolina Motor Carriers Association, Inc.

WILLIAM PAUL RODGERS, JR.
General Counsel
CHARLES D. GRAY
Assistant General Counsel
1102 ICC Building
Post Office Box 684
Washington, DC 20044
(202) 628-7324
Attorneys for Petitioner, National Association of Regulatory Utility Commissioners

**Counsel of Record*